1247

SUPREME COURT OF THE UNITED STATES.

No. 152.

DENNIS T. DONOVAN, PL'FF IN ERROR,

vs.

CHRISTIAN IHMSEN.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE EASTERN DISTRICT OF LOUISIANA.

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GIDEON, print.

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Circuit Court of the United States, fifth circuit, eastern district of Louisiana.

Transcript.

CHRISTIAN IHMSEN
vs.
DENNIS T. DONOVAN. } No. 2519.

Petition and Acc't, filed 13th Oct., 1855.

To the Honorable the Judges of the Circuit Court of the United States, in and for the fifth judicial circuit, eastern district of Louisiana, holding its sessions at New Orleans:

The petition of Christian Ihmsen humbly showeth: That your petitioner is a citizen of the State of Pennsylvania, and resides at Pittsburg, in said State; that Dennis T. Donovan is a citizen of the State of Louisiana, and resides in New Orleans, and is justly and truly indebted unto your petitioner in the full sum of twenty thousand one hundred and forty-eight $\frac{50}{100}$ dollars, with legal interest thereon from the 18th day of May, 1852, for this, to wit: that petitioner is the transferee herein of Frederick Laurenz, a citizen of Pennsylvania, who was transferee of Owen & Ihmsen, citizens of Pennsylvania; that defendant acted as agent of said Owen & Ihmsen, in the reception, sale, and delivery of their coal in New Orleans, from the 23d day of March, 1849, up to the 18th day of May, 1852, aforesaid; from which agency there resulted a balance of twenty thousand one hundred and forty-eight $\frac{50}{100}$ dollars against defendants and in favor of said Owen & Ihmsen, as will more fully appear from the account current hereto annexed and made part hereof, showing the above sum of $20,148 $\frac{50}{100}$ due and payable by defendant to said Owen & Ihmsen, with interest as aforesaid; and which sum and interest are now due and payable to this petitioner, by virtue of the transfers aforesaid, and which, though amicably requested thereto, the said Dennis T. Donovan declines and refuses to pay. Petitioner further showeth, that in a suit between this defendant and said Owen & Ihmsen, instituted in the fourth district court of New Orleans, the following agreement was filed on 1st day February, 1853:

It is hereby agreed, between the plaintiffs and defendants, that W. T. Richards shall fix, within one week from this date, the amount now due by Owen & Ihmsen to D. T. Donavan or by Donavan to Owen & Ihmsen; and in case he acts herein, we agree to be bound by his decision, which we consent may be entered up

at once as the judgment of the court in this suit, by our attorneys or either of them, without appeal. New Orleans, 31st January, 1853.

D. T. DONAVAN,
OWEN & IHMSEN.

DURANT & HORNOR, *Attorneys for Donavan.*
M. M. COHEN, *for Owen & Ihmsen.*

And the following agreement was filed on the 3d of February, 1853:

Whereas, in the agreement filed in this case on the 1st of February, 1853, it is agreed that W. T. Richards shall fix the amount now due by Owen & Ihmsen to D. T. Donavan or by Donavan to Owen & Ihmsen, &c., &c., and whereas said Richards refuses to act alone, but consents to act with D. W. Cerode—now we agree to modify said agreement, filed February 1st, 1853, in this: that said D. W. Cerode shall and may sit with Richards; and if the two cannot agree, then they may name an umpire, and their agreement or the umpire's shall be final, and may be entered up at once as the judgment of the court in this suit, by our attorneys or either of them, without appeal—the agreement of 1st February, 1853, to remain as originally written and filed, except as herein modified; and it understood and agreed that the said Richards and Cerode are to be considered as amicable compounders.

D. T. DONAVAN,
OWEN & IHMSEN.

That on the fifth of February, 1853, the following report was filed:

We, the undersigned, having been duly appointed amicable compounders, to examine and report on the matters of indebtedness at issue between Mr. D. T. Donavan, of New Orleans, La., and Messrs. Owen & Ihmsen, of Pittsburg, Pa., do find, after a careful examination of all the vouchers and accounts pertaining to said business, from March the 21st, 1849, to May 18th, 1852, that Mr. D. T. Donavan is justly and truly indebted to Messrs. Owen & Ihmsen in the full sum of twenty thousand one hundred and forty-eight $\frac{50}{100}$ dollars.

In witness whereof, we have hereunto set our hands and seals, this 5th day of February, in the year one thousand eight hundred and fifty-three.

W. T. RICHARDS, [L. S.]
D. W. CERODE, [L. S.]

Signatures and seals acknowledged before me, 5th February, 1853.
K. LEOW, *D'y Clerk.*

This is to certify, that by request of the foregoing arbitrators I acted as umpire, and do certify that their decision is correct in every particular. Witness my signature, day and date aforesaid.

M. HEBENSTRICT.

That on the hearing of a rule to confirm said report, the judge refused to make the same absolute; and the said Owen & Ihmsen having appealed from that decision, and from an order of the court granting said Donavan leave to discontinue said suit, the supreme court of Louisiana held that said report should not be homologated, because the amicable compounders were not sworn according to law.

Petitioner further showeth, that said suit being discontinued by said D. T. Donavan, and all the right, title, and interest of said Owen & Ihmsen in their claim against said Donavan having been transferred to Frederick Laurenz aforesaid, and subsequently to your petitioner, he therefore has instituted this action, and prays that said Dennis T. Donavan be cited to appear and answer this petition, and that after due proceedings had, said Dennis T. Donavan be condemned to pay to your petitioner the aforesaid sum of twenty thousand one hundred and forty-eight $\frac{50}{100}$ dollars, with interest as aforesaid, and costs of court. And petitioner prays for all other and further general and equitable relief.

(Signed) M. M. COHEN,
Of Counsel for C. Ihmsen.

Account filed with Petition.

To D. T. Donovan in account current with Owen & Ihmsen, Pittsburg, Pa.

1849.			
March 21	To amount stock of coal on hand this date, 6,560 brls., *a* 50	$3,280 00	
"	" 1 empty boat, $50; 5 mules, $625; 2 carts, $150; 5 sets harness, $125; 2 drays, $100.	1,050 00	
			$4,330 00
"	" amounts collected from agency, "Diamond"		2,358 95
1850.			
April 23	" amount rec'd of Mr. Anderson		72 66
Dec. 23	" " " Owen & Ihmsen		3,000 00
1851.			
Jan'y 4	" " " " "		2,000 00
6	" " " " "		1,000 00
March 23	" " proceeds 2 drafts received		757 20
1852.			
Jan'y 20	" " received of C. T. Ihmsen		48 30
March 14	" Owen & Ihmsen (?) acceptance sight draft		5,500 00
1851.			
Aug't 14	" services, &c., rendered Babcock & Fennell sundry times		844 90

Account—Continued.

1852.			
March 7	To amount profit on Pelican dry-dock stock sold		$185 00
21	" amount coal purchased from Mch. 21st, 1849, to date, viz:		
	Wells, Nimick & Co	$895 00	
	O. J. Merker & Co	3,575 00	
	—— Waterman	1,787 50	
	Jus. McCloskey	7,308 40	
	Field & Gandolf	4,230 00	
	Millenbuger & Duim	2,000 00	
	McBean, Willard & Co	1,573 80	
	Jno. Fitch	125 00	
	—— Le Blanc	7,463 72	
	D. Corden	1,667 00	
	Jas. Robb & Co	1,111 85	
			31,737 27
May 18	" 120 boats of coal rec'd at Willow Grove from March 21st, 1849, to date, containing 487,787 brls. *a* 50 c		243,893 50
"	" 120 coal boats (empty) as above, *a* $33		3,960 00
"	" 100 skiffs accompanying said boats, *a* $3		300 00
"	" excess over gauge in delivering of 120 boats coal, averaging 166⅔ brls. pr. boat—say 20,000 brls. *a* 50 c		10,000 00
			$309,987 78
1852.			
May 18	To balance bro't down		$20,148 50

Cr.

1852.			
May 18	By amount paid Owen & Ihmsen sundry times		$123,170 18
"	" 5 boats and parts of boats sunk at different times—say 17,444 barrels, *a* 50 c	$8,722 00	
"	" 5 boats containing above coal, *a* $33	165 00	
			8,887 00
"	" excess allowed on boats sunk, 667 brls., *a* 50	333 50	
"	" " " over-gauge on 15 boats of coal sold at gauge, averaging 166⅔ brls.—say 2,500 brls., *a* 50 c	1,250 00	
			1,583 50
"	" amount paid sundry purchases of coal at sundry times from March 21, 1849, to March 21st, 1852		31,737 27
"	" amount of uncollected accounts outstanding, from March 21st, 1849, to this date		2,962 67
"	" amount of deficit on deposit of part of fixtures		262 25
"	" amount of expenses, pay-rolls, &c., paid from March 21st, 1849, to March 21st, 1852, as per vouchers	89,404 27	
"	" amount of expenses paid during same time as above without vouchers, but considered correct	6,648 23	
"	" amount of expenses and pay-rolls p'd in April, 1852	4,239 45	
"	" amount of expenses and pay-rolls paid in May, 1852	270 35	
"	" amount of balance due slaves Moses (of D. T. D,) for wages	272 33	

Account—Continued.

1852.			
May 18	By services of D. T. Donovan from March 21st, 1849, to May 18th, 1852—say 3 2-12 years, *a* $1,500 per annum	$4,750 00	
			$105,584 63
"	" amount of coal transferred to W. T. Richards this date—say 30,428 barrels, *a* 50 c		15,214 00
"	" amount of fixtures transferred to W. T. Richards this date, viz:		
	1 fire-proof safe	130 00	
	4 coal buckets, $34; 2 do. draw, 33 25;		
	1 cart, $75	142 25	
	2 torch-baskets, $12 75; 1 office desk and fixtures, $10	22 75	
	2 platform scales, $80; 2 anchors' blocks and falls, $62 78	142 78	
			437 78
	Balance carried down		20,148 50
			$309,987 78

Original signed, New Orleans, Feb'y 5, '52.

D. W. CERODE,
W. T. RICHARDS,
Arbitrators.

M. HEBENSTRICT,
Umpire.

Answer, filed 8th Nov'r, 1855.

To the Honorable the Judges of the Circuit Court of the United States for the fifth circuit and eastern district of Louisiana.

And now comes, by his attorneys, Dennis T. Donovan, a citizen of Louisiana, and for answer to the petition filed against him by Christian Ihmsen, respectfully represents, that he denies all and singular the allegation in said petition contained. He further says, that it is true, he once acted as agent in this city for the firm of Owen & Ihmsen, of Pittsburg, but that he owes them nothing for account of said agency, or for any other account, and if they ever pretended to claim from him such an amount as is set forth in the petition, he denies that they have ever transferred the same as is alleged. He further denies, that the agreements and decisions of the arbitrators set forth in the petition ever had, or have now, any legal or binding force upon him. Wherefore this respondent prays to be hence dismissed with costs, and for general relief.

(Signed) DURANT & HORNOR, *Attorneys.*

Supl. Answer and Prayer for Jury, filed 25th March, 1856.

U. S. Circuit Court for 5th circuit and east'n dist. of La.

CHRISTIAN IHMSEN
vs.
DENNIS T. DONOVAN.

To the Honorable the Judges of the United States Circuit Court for the fifth circuit and eastern district of Louisiana.

The supplemental answer of Dennis T. Donovan, defendant, a citizen of Louisiana, respectfully shows, that he desires this case to be tried by jury. Wherefore respondent prays that this, his supplemental answer, be filed, and that this case be put upon the jury docket of the court and tried as a jury case; and respondent prays for all further general and equitable relief.

(Signed) DURANT & HORNOR,
Defendant's Att'ys.

Order.

Let this be filed.
(Signed) THEO. H. McCALEB,
U. S. Judge.

Minutes April term, 1856.

New Orleans, Thursday, 5th June, 1856. Court met pursuant to adjournment: Present Hon. J. A. Campbell, presiding judge; Present Hon. Theo. H. McCaleb, district judge.

CHRISTIAN IMHSEN
vs. 2,519.
DENNIS T. DONOVAN.

This cause was called for trial, and the witnesses not being present, the trial by jury was waived by consent of parties, and the cause continued to to-morrow. And attachments were asked and ordered for the defendant's witnesses, returnable at that time.

Trial of Cause.

New Orleans, Friday, 6th June, 1856. Court met pursuant to adjournment: Present Hon. J. A. Campbell, presiding judge; Present Hon. Theo. H. McCaleb, district judge.

CHRISTIAN IHMSEN
vs. 2,519.
D. T. DONOVAN.

This cause came on to be heard, M. M. Cohen, esq. appearing for plaintiff, and T. J. Durant, esq. for the defendant. Where-

upon witnesses were heard, and the trial proceeded with until 3 o'clock p. m., whereupon the cause was continued until to-morrow.

Deft's Plea of Prescription, filed 7th June, 1856.

U. S. Circuit Court, for fifth circuit and eastern district of Louisiana.

CHRISTIAN IHMSEN
vs.
D. T. DONOVAN.

Now, into this honorable court, by his attorneys, comes the defendant, Dennis T. Donovan, and, as a peremptory exception and plea in bar to this suit, shows that this action, being an action upon an open account between Owen and Ihmsen and the defendant, D. T. Donovan, is barred under the statute of Louisiana of 5th March, 1852—session acts of that year, page 90—in three years.

Wherefore this defendant pleads the said prescription of three years, and prays the court to sustain the same, and to render judgment in favor of the defendant, D. T. Donovan, with cost and all general and equitable relief.

(Signed) DURANT & HORNOR,
Defendant's Att'ys.

Deft's Bill of Exceptions, filed 7th June, 1856.

Circuit Court of the United States, for the fifth circuit and eastern district of Louisiana.

IHMSEN
vs.
D. T. DONOVAN.

Be it remembered, that on this sixth day of June, 1856, when this case came on for trial before the court, the counsel of plaintiff put upon the stand one W. T. Richards as a witness, and having proved by said witness that certain accounts and documents which were placed in his hands were made in the handwriting of the defendant, or of one of his clerks, and signed by the defendant, or one of his clerks, and which had been rendered by the defendant to the arbitrators referred to in the petition, which accounts and documents were filed by the clerk, and marked , true and perfect copies of which accounts are hereunto annexed for reference, and to form a part hereof, the counsel of plaintiff then proceeded to ask the witness, and to prove by him that the aforesaid accounts and documents were the basis of a certain account annexed to plaintiff's petition herein, signed by the said witness and by D. W. Cirode, and dated on the day of February, 1853; and thereupon the counsel of plaintiff proceeded to offer said account in evidence.

And the counsel of defendant objected to all of said accounts and documents, on the ground that the same formed no legal proof against him, the account signed by said witness, Richards, and by D. W. Cirode, a true copy of which is hereunto annexed for reference, and to form a part hereof, being inseparably connected with the other accounts and documents deposed to by the witness, Richards, and all of them having been formerly introduced in evidence between the parties to this suit, in a suit formerly at issue between them for the same cause of action in the fourth district court of New Orleans; and the whole of said accounts and documents being part and parcel of a report made by the witness, Richards, and the said D. W. Cirode, as arbitrators in the said suit in the fourth district court, which report, according to the allegations of the petition, was rejected by the court, by reason of which rejection it became null and void, and cannot now be revived by the action of this or any other court.

The court admitted the accounts which were made by the defendant or his clerk, and rendered to the arbitrators by him as admissions of the defendants, and required all the items on the debit side of the account of the arbitrators to be substantiated by a reference to the books of the defendant, as admissions by him or other evidence, and did not receive the opinions or conclusions of the arbitrators as being of any evidence in the cause—ruling that the account must be proven as if there had been no arbitration, but that admissions of the parties before the arbitrators were competent as evidence against the parties making them.

The defendant objected still to the competency of the evidence and to the opinion of the court, and prayed the court to sign and seal this bill of exceptions, which is done accordingly.

(Signed) J. A. CAMPBELL,
Asso. Justice S. C. U. S.

Letter from D. T. Donovan to Messrs. Owen & Ihmsen, annexed to foregoing bill of exceptions.

NEW ORLEANS, 11*th June*, 1849,
Monday, 1 *p. m.*

Messrs. OWEN & IHMSEN,
Pittsburg, Pa.

GENTLEMEN: The Falcon has just started this day at 10 a. m.; she took 3,268 bbls. coal (a 200 lbs. p'r bbl.) I am happy to inform you that I have made out equally as well, if not better, with the Falcon than I did with the "Isthmus," as you recollect the original gauge of the boat "179" was 3,817 barrels, of which I have given you a full detail on a former occasion—that is to say, 1,457 bls. on board the "Isthmus" first trip, 1,366 bls. the second trip, and now 1,750 bls. on the Falcon this her first trip, making 4,573 bls.,

leaving a net gain of 756 bls. on the gauge of the above boat; this "fact" occurred without any premeditated "motive or design" on my part to take any advantage (undue or unfair) of the officers of said boat.

Unfavorable circumstances from the start gave me finally a "favorable opportunity" to improve the "unfavorable circumstances" which I had to encounter in the legitimate discharge of the duty *devoloped* on me on this occasion. For instance, the "Falcon" arrived here three days later than her time (Friday morning last). I commenced rigging her stage at once, which took me better than half the day (she being full 12 feet above the wharf). Following day Jerry Lane set to work; hired 25 men to wheel the coal on board; out of this number only 5 men made a full day. Saturday he employed 12 men, who were enabled to wheel on board only 360 bls. coal from 7 p. m. until 1 a. m. The consequence was, I had to employ my own hands on Sunday morning to wheel the balance of the coal on board, without which I never would have been able to get along, the scarcity of men was so great. No gang of men could work a full day—the weather was so excessively hot, and the stage of the vessel so steep. The captain and the agents requested, as a particular favor, that I should work day and night, solely for the express purpose of facilitating the st'mship's departure, she having been unavoidably detained much behind her time at Havana in transferring her passengers for "Chagres" to the "Isthmus," a greater part of which came on here to N. Orleans, among whom were several "eminent engineers," who having fully tested our coal, highly recommended it to Messrs. Paradise, Laurason & Co., the agents, for its great superiority in producing a much greater quantity of steam in proportion than any "other;" and in consequence thereof we have to supply the st'mship Alabama, which vessel has been chartered by Messrs. P., Laurason & Co. to convey those of the Falcon's passengers who arrived on her here, to Chagres. The Isthmus would have taken at Havana all the F.'s passengers had she had room for them; but as there was not, the balance came on here, as I said before, insisting that the Falcon should take them to "Chagres" as agreed upon. The agents deeming it more expedient, chartered the Alabama rather than the Falcon should lose her trip to Havana and New York. This is rather bad management, but it will teach them (the company) to do better in future, as this "chartering," I think, will take off some of their profits. The Falcon (as you may know by this time) is now commanded by a naval officer, Lt. Hartstein. She likewise has had an entire change of subordinate officers; the change is much for the better, for they are, or seem to be, very clever and gentlemanly throughout. Commanded as the Falcon now is, by an officer of the navy, punctuality, &c., &c., must need be expected, for she left

her berth at the "Bull's Head" at 10 o'c'k this morning to the very minute, leaving behind several passengers, who will either have to overtake her at the Belize by a tow-boat or lose their passage. The F. had her complement of passengers, and very much crowded; she got about 60 passengers from the st'mship Cresent City, which arrived last night from Chagres direct, with $1,000,000 in gold dust; she fully confirms the exorbitant accounts of the richness of the mines of the valley of the "Sacramento." By her, dates up to the 1st May are received from San Francisco, brought by the California to "Panama." The C. C. brings 5 large mails, several officers of the navy, bearer of despatches, &c., &c., a large number of passengers. At the time of her departure "Panama" was deserted; every one man had taken passage for the "El Dorado;" but I need not say any more, as I take it for granted you are aware of all ere this. Our city is still inundated; the water has receded about 2 or 3 feet only. The crevasse is now, from all accounts, in a fair way of being stopped, and strong hopes are entertained that it will be. The weather is at its extreme of heat just now, which is almost overpowering. I have heard of one or two cases of persons being sunstruck in the last few days, but they were those who were workingmen and exposed to the sun. We made very slow progress coaling the Falcon during the day; the most we done was in the fore and latter part of the day and at night, and this with much encouragement and exertion.

MR. OWEN:

DR. SIR: After writing the foregoing disposition of the coal I delivered to these steamships, I have come to the conclusion that I would not address this letter to the firm, but address it to you individually, as you are the (better judge), particularly as I have not heard a word from Messrs. Owen & Ihmsen since your own favor of the 10th May, in which you gave me the particulars in relation to the 4 pair of boats you started at the time, and arrived a few days after your letter.

Mr. Ramsey has not written as yet, nor even Mr. McGowan, on whose proverbial punctuality I depended so much in sending me a full details in relation to your business. I have written at least twenty letters, among which were some worthy of your acknowledgment; but such is not the case. I hope you will see into this matter, and let me know why think me unworthy of their correspondence. I have faithfully attended to the discharge of my duty, in keeping a correct and systematic account of your business, and the disposition made of your coal, both in receiving and delivering, and have been very successful, particularly in delivering to the steamships. If there had been any errors in my "pay-rolls," it entirely

rests with yourselves. I consulted an eminent lawyer (one of your friends) on this subject, and showed him your letters of instruction, and he gave his decided opinion that your instructions were so ambiguous with these men, (pilots and crews), that they could extort a great deal more money from me than if I had a regular letter of instruction relative to the amount to be paid to each. I will gauge all the boats to-morrow, and send you a full account, with dimensions, &c., of each one. I have kept such a regular account of the boats received, and what has been delivered, that in five minutes' time you can tell what has been done since I took charge of the business. I have kept a true and faithful account of each and every barrel of all that has been received and delivered. I regret very much not having heard from you individually, and particularly from Messrs. Owen & Ihmsen. (I have given up all hope of hearing from Mr. Ramsey.) It is very disagreeable to ride from a leaky boat at the "Willow Grove" to the post office twice a day, in the hope of receiving a letter from you; but such is the fact for the last 5 or 6 days. I also regret that I could not carry your instructions into effect in relation to the absorption of the coal, in consequence of the watchful eyes of your competitors, who are already jealous of my success in delivering the coal to these steamships; "but got along just as well." No more at present from your

Very respectfully and ob't serv't,

(Signed) D. T. DONOVAN,

Pr. R. L. D.

Letter from D. T. Donovan to Messrs. Owen & Ihmsen, annexed to foregoing bill of exceptions, filed

NEW ORLEANS, *Sept. 27th*, 1849.

MESSRS. OWEN & IHMSEN,
Pittsburg, Pa.

GENT.: Your favor of the 17th is just come to hand, informing me that the memorandum of the disposition furnished me by Mr. Diamond of the 11 boats is not quite satisfactory. In reply, I cannot at present send you a more authentic acc't of said boats. I have given the names of the parties who purchased the boats, the proceeds being disposed of before I took charge of the business. I was not aware of what time the first boats arrived, in consequence of not seeing any record or memorandum made of their arrival, &c., &c.

I will endeavor now to ascertain the exact am't of cash remitted you from the date mentioned in your favor, (say 5th January,) and probably succeed in finding out some omission or mistake in the ac.; in fact I am much surprised the matter was not satisfactorily arranged long ago. I keep a regular "record-book" for the purpose of keeping note of the arrivals, gauge, &c., also the delivery of each and every boat disposed of as yet to Paradise, Laurason

& Co., so that at a glance you can tell how many bbls. the boat or boats overrun the gauge, &c. &c. &c. If this was done heretofore, you would have no trouble in settling your coal ac. in five minutes. I am very glad to learn that you are well prepared to send some boats by the first rise, which, if they get here safe, would yield you a handsome profit, the stock being rather limited. Wells, Nimmick & Co. have about 23 or 24,000 bbls., Farrell about 20,000, and Wilson about 18,000 bbls.; the rest are small potatoes. No coal afloat, except what I have. Farrell owes a balance of $250 of the boat-load sold him before my time. Vanarnum has not made his appearance as yet; I will keep a bright look-out for him.

We expect the "Ohio" this evening or to-morrow morning, and the "Falcon" will be here on the 30th or 31st. I will try to coal one of them out of a boat I have alongside of the wharf. In great haste I remain, very respectfully, yours, &c. &c. &c.

(Signed) D. T. DONOVAN.

P. S.—No money to pay letter-paper with.

Letter from D. T. Donovan to Messrs. Owen & Ihmsen, annexed to foregoing bill of exceptions.

NEW ORLEANS, *March 22d*, '50.

MESSRS. OWEN & IHMSEN:

GENT.: Having nothing to do this morning, I will *condensed* you a memorandum of the disposition made and the quantity of coal rec'd by me from the 20th March, 1849, to the 20th March, 1850; including the stock of coal on hand up to that date. Rec'd in all, and what's on hand 21 M., '49, 147,424.

By sales of coal to sundry persons	15,803
" loss of boat, sunk landing her to B. H'd	4,047
" sales of coal delivered Isthmus	4,047
" " " " Falcon	39,426
" " " " Ohio	42,099
" " " " Georgia	7,000
" " " " Alabama	17,044
" Balance of stock on hand	17,958
	147,424 bbls.

The stock of coal on hand actually is 24,374 bbls. at the wharf, (Bull's Head,) and Willow Grove—excess only 8,374 bbls.; which would have been more, were not for the loss of the above boat, and the strict manner in which the coal was delivered.

However, under all the circumstances, and taking every thing into consideration, giving two hundred pounds to the bbl., and al-

lowing a very liberal "gauge," that the result ought to be satisfactory. You will find, gent., the above to be correct, when you examine my books in detail, &c.

No coal selling; warm enough for the month June; some "cholera" in town, not much. I should have stated to you, gentlemen, that there is not a single bbl. of coal retailing, except to steamboats, at the low rate of 40 c. pr. bbl., delivered. At this price I have refused to supply any of then, being confident, from the conversation I have had with Mr. Lawrason lately, that I will get the contract. The only drawback on this contract, for the present, is that these large steamships do not come to this city half as regular as we anticipated from the first; for instance, the "Georgia" goes back to New York from "Chagres" in place of coming here. The Alabama is laid up undergoing repairs, and will not take any more coal this season, except once. This eventually is a great drawback on our delivery of coal, &c., &c. There will be another steamship on this route with the "Crescent City," but unfortunately she belongs to Harris and Morgan's line. I proposed to coal these boats for 5 c. per bbl. less than Farrell's getting, but to no effect; he, Farrell, being so much in debt to the parties since last summer, that he is more acting in the capacity of a clerk, or superintendent, than that of a contractor. There are no other contracts offering at present, or for some considerable time back; should there be any, I assure you I will keep a bright look for them, &c., &c. I may add that I have "assurances" from Messrs. Paradise, Lawrason & Co., for the continuation of the contract, &c. Wells, Warrick & Co. offered to coal these steamships for three months from the 1st of April for 40 c. pr. bbl., delivered on board. They are the greatest "curse" to the coal market, and to coal dealers in general—more so than even the "cholera" itself, in a large community, or city like this. After a while you will have to send your coal to more *geneved* climate than this; we have no use for it whatever, except for steam purposes, the weather being so fine and warm.

Very respectfully, your ob't ser't,
D. T. DONOVAN.

Letter from D. T. Donovan to Messrs. Owen & Ihmsen, annexed to the foregoing bill of exceptions.

NEW ORLEANS, [illegible]

MESSRS. OWEN & IHMSEN:

GENT.: Your favor of the 19th ultimo came to hand this morning, and contents duly noted. In reply I know not what to say, in consequence of the implied doubts applicable to the meaning or construction of your remarks, &c.; in which you state, from the

number of boats or vessels coaled you ought to be in the receipt of $10,000 00. For your satisfaction I will give you the following memorandum of all the coal delivered in the three months past, except a few loads. I delivered from the 1st of June to the 1st of September, to sundry vessels, 31,277 bbls., at 50 c. per bbl., $15,638 50. I remitted you $13,000 00 to Pittsburg; in the same months paid to James Robb & Co. $2,500 00, rec'd of him thirty days previous, for the purpose of paying the last crew arrived with coal, &c., &c. Respecting the reported rumors of the Pittsburg coal runners, in reply to that I state to you positively that John Watson never purchased any coal of me. I sold a pair boats to Mulforo & Co. on commission, a pair that was sold by McCusky to a Frenchman in Lafayette. Corry's boats were landed at the Bull's Head, and discharged according to Mr. Owen's instructions, because they were weaker than your own. My acct. current will be mailed as soon as possible, or as soon as I can put it in any shape, &c. I have, on a former occasion, mentioned to you that I had purchased a pair boats, and that I could sell them at a profit, but cannot as yet dispose of them until I hear some favorable news from you. The total number of bbls. rec'd, including the stock on hand when I took charge of the business, am'ts to 235,681 bbls. I want to deliver 34,330 bbls. to make my stock balance, &c. I have at least, including what there is on the wharf, 50,000 bbls., which would give me an excess of 7,000 bbls., and 8,670 bbls. in the last pair purchased, for which I have to pay $3,574 00 for an overplus of coal of 15,670 bbls. This slight memorandum will plainly show you that you have mistaken respecting the manner in which your business has been conducted, &c.

I remain yours, resp'y,

(Signed) D. T. DONOVAN.

P. S.—The Alabama arrived yesterday, and will commence coaling her to-morrow, should I succeed in making some favorable arrangements with them. I consider they broke the contract when they took her off the route and send her to New York; however, I suppose I must coal her. I am heartily sick of the coal business, but will pay it the utmost attention until fall, or until Mr. Owen comes down. For the best coal mine in Pittsburg, I would not be subject to those imputed doubts respecting your business. Time is the great truth-teller. If your interest in this place was conducted on the same footing that Mr. Ledlie's was, or Dr. Ornesby, or any of the others were, I would not mind it, if your remarks were ever so sarcastic or personal.

Very respectfully, your ob't serv't,

(Signed) D. T. DONOVAN.

Bill of Exchange annexed to the foregoing bill of exceptions.

NEW ORLEANS, 17*th March*, 1851.

$5,500 00.

One day after sight of this first of exchange (second unpaid) pay to the order of James Robb & Co., per Philadelphia funds, fifty-five hundred dollars, value received, and charge the same to account.

Your ob't serv't,

(Signed) D. T. DONOVAN.

To C. IHMSEN, Esq.,
Pittsburg, Pa.

No.

March 29th, 1851. Accepted.

C. IHMSEN.

(*Endorsed.*)

626.
C. Ihmsen.
5,500.
Ex. 2,750.
Mar. 30–2.
Pay John Sundwerlur Cushmandem.
JAMES ROBB & CO.

Trial Balance annexed to the foregoing bill of exceptions.

Trial Balance, Owen & Ihmsen, D. T. Donovan, Agent, October, 1851.

Folio 1	Cash	.....	00
2	Coal acc	.....	$3,593 55
3	Expense acc	$86,092 33	
5	Owen & Ihmsen	.....	73,593 26
6	C. Ihmsen	.....	11,429 01
7	Steamship Alabama	2,000 00	
8	D. T. Donovan	1,432 26	
9	Bills payable	.....	4,700 00
10	McAfer & Young	160 19	
11	Hart, Thomas & Co.	84 00	
13	True Delta Office	57 50	
15	Armstrong, Laurason & Co.	15 00	

16	Jas. R. Jennings	$30 00	
17	Suspense acc	762 85	
18	Steamship Fanny	590 03	
23	" Georgia	.....	49
25	Sol. High	45 00	
28	W. Goodale	100 00	
30	J. M. Ober	4 00	
31	Steamship "Empire City"	1,193 15	
32	Tow-boat "Union"	750 00	
		$93,316 31	$93,316 31

Trial Balance 28th February, 1852, *annexed to foregoing bill of exc'pt's.*

3	Expense acc't	$92,638 09	
5	Owen & Ihmsen	.....	$68,093 26
6	C. Ihmsen	.....	11,297 31
8	D. T. Donovan	.....	5,813 92
9	Bills payable	.....	750 00
10	McFee & Young	160 19	
11	Hart, Thomas & Co	138 00	
13	True Delta Office	57 50	
16	J. R. Jennings	65 00	
17	Suspense acc't.	762 85	
24	J. y de Egana	371 40	
"	Steamship Georgia	.....	49
26	Jno. C. Stewart	105 00	
27	McBean, Willard & Co	150 00	
28	N. Goodale	100 00	
29	Steamship Cherokee	1,245 27	
30	O. J. Owen	35 00	
34	Coal acc't	.....	9,873 32
		$95,828 42	$95,828 42

E. E. New Orleans, Febr'y 29th, 1852.

(Signed) D. T. DONOVAN,
By pr. JNO. C. TAYLOR.

List of Coal Boats received by D. T. Donovan, Agent, and their gauge and time of arrival from May, 1849, to 1st April, 1852, annexed to foregoing bill of exceptions.

Numbers.	Pilots.	Date of arrival.	Gauge.	Barrels.	Total.
1 1	W. Howard....	2d Apr., 1849	.....	4,020	
2 177	.....	.....	3,209		
3 178	Dow Tilton....	9th do. "	3,324	6,533	
4 179	.....	.....	3,810		
5 180	Jno. Leeper....	20th do. '49	3,849	7,659	
6 181	F. Grey.....	31st May, "	3,860	3,860	
7 183	J. Anderson...	31 do. 1849	3,760	3,760	
8 185	.....	.....	4,209		
9 186	At. Hall.....	29 do. 1849	4,161	8,370	
10 187	.....	.....	3,847		
11 188	D. Robinson...	29 do. "	3,871	7,718	
12 189	.....	.....	4,134		
13 190	A. Tatum.....	28 July, "	4,144	8,278	
14 191	.....	.....	4,061		
15 192	M. A. Dickens.	27 do. "	3,541	7,602	
16 193	.....	.....	4,164		
17 194	J. Harkins.....	31 do. "	4,164	8,328	66,128
18 195	.....	.....	3,724		
19 196	J. K. Hall.....	10 Jan'y, 1850	3,888	7,612	
20 197	.....	.....	3,759		
21 198	C. Crusen.....	29 Dec'r, 1849	3,710	7,469	
22 199	.....	.....	3,861		
23 200	U. A. Skeggs..	31 do. do.	3,771	7,632	
24 201	.....	.....	3,868		
25 202	J. Leeper.....	28 do. do.	3,748	7,616	
26 203	.....	.....	3,796		
27 204	At. Hall.....	30 do. do.	4,049	7,845	
28 206	.....	.....	3,810		
29 210	W. Clowe.....	12 Jan'y, 1850	4,068	7,878	
30 207	.....	.....	3,957		
31 208	Hy. Browne....	31 Dec'r, 1849	4,121	8,078	
32 212	H. Paulson.....	16 Jan'y, 1850	4,010	4,010	

List of Coal Boats—Continued.

Numbers.	Pilots.	Date of arrival.	Gauge.	Barrels.	Total.	
33 213	.....	.....	3,976			
34 214	R. McMillen...	12 Jan'y, 1850	4,047	8,017		
35 215	.....	.....	4,228			
36 216	Jno. Leeper....	19 Feb'y, do.	4,325	8,553	74,710	
37 217	.....	.....	4,106			
38 218	C. Cruden.....	11th Mar., do.	4,035	8,141		
39 219	.....	.....	4,331			
40 220	U. A. Skeggs..	4th April, do.	4,335	8,666		
41 221	.....	.....	4,146			
22 222	At. Hall.....	4th do. do.	4,109	8,253		
43 223	.....	.....	4,765			
44 224	W. Clowe.....	10th do. do.	4,646	9,411		
					Purchases at Pittsburg.	
45 225	Dravor.....	.....	5,047		Dravor's boats *avnd* ought	
46 226	J. Anderson...	12th do. do.	5,070	10,117	not to be numbered.	
47 225	(No. 2).....	.....	4,034			
48 226	R. McMillen....	22d May, do.	4,123	8,157		
49 227	.....	.....	4,271			
50 228	C. Cursen.....	22d May, do.	4,274	8,545		
51 229	.....	.....	4,242			
52 230	Hy. Browne...	22d do. do.	4,079	8,321		
53 231	.....	.....	4,097			
54 232	J. Leeper.....	21st do. do.	4,017	8,114		
55 233	.....	.....	4,234			
56 234	U. A. Skeggs	22d do. do.	3,973	8,207		
57 c'ry	.....	.....	4,301			
58 ½	J. Mitchell.....	23d do. do.	4,291	8,592	94,524	235,362
58	Carried forw'rd	.....	.....	.....	Barrels	235,362
58 carry						
3	.....	.....	4,235			
4	J. K. Hall.....	26th May, 1850	4,137	8,372		
235	.....	.....	3,837			
236	A. Hall.....	27th do. do.	4,036	7,873		
237	.....	.....	4,112			
238	A. Hall.....	30 Dec'r, do.	3,678	7,790		
239	.....	.....	3,849			
240	J. Plastens.....	3 Jan'y, 1851	3,721	7,570		

List of Coal Boats—Continued.

Numbers.	Pilots.	Date of arrival.	Gauge.	Barrels.	Total.
241	.....	.....	3,820		
242	Jno. Leeper....	25 Dec'r, 1850	3,784	7,604	
243	.....	.....	4,120		
244	Jno. Hickman.	28 do. 1850	3,855	7,975	
245	.....	.....	4,020		
246	W. B. Coxe....	30 do. do.	3,841	7,961	
247	.....	.....	3,862		
248	J. K. Hall.....	28 do. do.	3,785	7,647	
249	.....	.....	4,080		
250	J. Dickey.....	28 do. do.	4,112	8,192	
251	.....	.....	4,101		
255	Jno. Haines....	2d Jan., 1851	3,868	7,969	78,953
253	.....	.....	4,285		
254	U. A. Skeggs..	29 Dec'r, 1850	4,112	8,397	
257	.....	.....	4,116		
258	Louis Pope.....	4 Jan., 1851	3,835	7,951	
259	.....	.....	3,935		
260	Hy. Browne...	25 Dec'r, 1850	4,068	8,003	
261	.....	.....	3,841		
262	Alf. Davis.....	25 do. do.	3,720	7,561	
263	.....	.....	3,878		
264	C. Crusen.....	Do. do.	3,984	7,862	
267	.....	.....	4,313		
268	U. A. Skeggs..	6th Mar., 1851	4,226	8,529	
269	.....	.....	3,972		
270	Step. King.....	6th do. do.	4,012	7,984	
271	.....	.....	4,542		
272	Jno. Leeper....	5th do. do.	4,751	9,293	
273	.....	.....	4,109		
274	A. Hall.....	5th do. do	4,201	8,310	
275	.....	.....	4,441		
276	J. Anderson...	10th do. do.	4,080	8,521	82,421
277	.....	.....	3,785		
278	C. Crusen	6th do. do.	3,851	7,636	
279	.....	.....	4,515		
280	T. Sheppard...	20th June, do.	4,580	9,095	

List of Coal Boats—Continued.

Numbers.	Pilots.	Date of arrival.	Gauge.	Barrels.	Total.
281	.....	.....	4,270		
282	A. Davis.....	18th June, 1851	4,165	8,435	
283	.....	.....	3,976		
284	R. R. Young...	18th do. do.	3,864	7,840	
285	.....	.....	3,649		
298	Jno. Stewart..	27th Feb., 1852	3,871	7,520	
289	.....	.....	4,207		
290	Jno. Haines....	28 do. do.	4,285	8,492	
291	.....	.....	3,653		
297	Hy. Browne....	19 do. do.	3,556	7,209	
292	.....	.....	4,082		
293	Jno. Leeper....	27 do. do.	4,399	8,481	16 men drapped.
295	.....	.....	3,962		
296	C. Crusen.....	28 do. do.	3,847	7,809	72,517 233,891
116 boats	.....	.....	.....	.....	Total.....469,253

E. E. New Orleans, April 1st, 1852.

(Signed) D. T. DONOVAN, *Agent*.
Per R. L. DAVIDSON.

[*See original for omissions.*]

299	.....	.....	4,591		
300	Brown	April 17, 1852	4,605	9,196	Barrels.
301	.....	.....	4,658		
302	Leaper	Do. 29, do.	4,680	9,338	"
				18,534	

Memorandum of the number of bbls. coal delivered to steamships since the 21st March, 1852, until the 1st June.

March	25	"Empire City"	3,527	bbls.
"	"	"Cherokee"	4,680	do.
Ap'l	7	"Georgia"	7,342 $\frac{162}{200}$	do.
"	"	"Falcon"	3,532 $\frac{65}{200}$	do.
"	"	"Philadelphia"	1,167 $\frac{180}{200}$	
"	20	"U. States," transient	1,937	
"	21	"Empire City"	3,643 $\frac{04}{200}$	
May	8	Wm. Penn, transient	794	
"	"	"Georgia"	7,357 $\frac{100}{200}$	
"	22	Empire City	2,773 $\frac{160}{200}$	
		New Orleans	36,755 $\frac{69}{200}$	bbls.

June 1st, 1852. The above is a correct account of the quantity of coal delivered to steamers out of the new run (say seven pair boats).

(Signed) D. T. DONOVAN.

Exhibit B, annexed to the foregoing bill of exception.

(Written in pencil.)

Stock on hand on the 1st June, handed over to Richard.

A memorandum of seven pair Boats received of Messrs. Owen & Ihmsen, Pittsburg, Pa.

Pittsburg gauge.		N. Orleans gauge.		Delivered from this stock.
No.				Received the following quantity, as per day-book:
295 o,	4,226 bbls.	285,	4,182	March 25, Empire City x..... 3,527
296 o,	4,515 do.	298,	3,943	" " Cherokee x..... 4,680
290 o,	4,206 do.	289,	4,207	Ap'l 7, Georgia x..... 7,342
289 o,	4,476 do.	290,	4,285	" " Falcon x..... 3,532
298 o,	4,078 do.	291,	3,653	" " Philadelphia x..... 1,167
285 o,	4,549 do.	297,	3,556	" 20, U. States x..... 1,937
293 o,	4,118 do.	292,	4,082	" 21, Empire City x..... 3,643
292 o,	4,202 do.	293,	4,399	May 8, Georgia..... 7,357
297 o,	4,206 do.	295,	4,211	" " x Wm. Penn..... 794
291 o,	4,084 do.	296,	4,128	" 22, x Empire City..... 2,773
299,	4,908 do.	299,	4,591	
300,	4,914 do.	300,	4,605	x Delivered.....36,752 bbls.
301,	4,652 do.	301,	4,658	x leaving a balance of stock on hand, including the one coal-boat afloat, B, of 33,088 bbls. out of the original gauge at Pittsburg, or 30,428 bbls. out of the New Orleans gauge, as pr. memorandum book.
302,	4,706 do.	302,	4,680	
	61,840 bbls.		59,180	
Old stocks,	8,000 do.	Old stocks,	8,000	
	69,840 bbls.		67,180	
	67,180			
Diff'nce of	2,660 bbls.			

NEW ORLEANS, *June 1st*, 1852.

The am't, if average of 25 bls. are admitted, will be 37,224 bbls. in the whole. $14 06 stock.

D. T. DONOVAN, *Ag't.*
OWEN & IHMSEN.

(Written at the foot of second page in pencil.)

Balance coal on hand.....	8,000
Am't new stock.....	59,180
	67,180
Coal deliv'd steamships by Donovan.....	36,752
	30,428

This being the stock left on ceasing of Donovan's agency, and handed over to Richards, D. being credited.

(Written on third page.)

Per ac. of stock left at New Orleans, as follows, after the vessels were coaled, as shown on the within, and taken the deduction from Pittsb'g gauge of 2,660 bbls.

It is 30,428	Amt. as pr. average of 25 bbls.—
a 49	30,428
	25 average
273852	
121712	152140
	60856
$14,909 72	
1,863 47 average	2)7,606 00
16,773 19 amt.	3,803
12,000 00 draft	49
$4,773 19 balance	34227
	15212
	$1,863 47 amt.

Expense of 2½ cents for *putterg* on board to be deducted, and discharging one boat and hand for pumping the same, one *emty* boat not included, and one *skeft*. This entirely separate from Mr. Donovan's ac. up to the 21st of March, 1852.

1259

(Written at the foot of third page in pencil.)

Those marked (O) are included in the original gauge, leaving the 4 latter boats not included; which added to the original list of 116 boats, make 487,787 pr. his own gauge and charged him; he is then credited with the quantity he handed me.

(*Endorsed.*)

Coal memorandum of the gauge of coal by Donovan, compair with his former statements.

Account between D. T. Donovan, agent, and his principals Owen & Ihmsen, referred to in the foregoing bill of exceptions, and dated New Orleans, 5th February, 1853, and certified by W. T. Richards, D. W. Cirode, and N. Habenstried.

NOTE. For this document, see account annexed to petition, ante, page 4.

Minutes April term, 1856.—*Submission of Cause.*

New Orleans, Saturday, 7th June, 1856. Court met pursuant to adjournment: Present, Hon. J. A. Campbell, presiding judge; present, Hon. Theo. H. McCaleb, district *court.*

CHRISTIAN IHMSEN
vs.
DENNIS T. DONOVAN.

This cause was resumed, and after hearing further testimony and argument of counsel it was submitted to the court and taken under advisement.

Minutes April term, 1856.

New Orleans, Tuesday, 10th June, 1856. Court met pursuant to adjournment: Present, Hon. J. A. Campbell, presiding judge; present, Hon. Theo. McCaleb, district judge.

C. IHMSEN
vs.
D. T. DONOVAN.

At the instance of plaintiff's counsel, and with the consent of the defendant, this cause is retained under advisement until the next term, with the leave to the parties to file additional briefs.

Opinion of the Court, rec'd 15th, and filed and entered 17th Nov., 1856.

In the Circuit Court eastern dis't of La.

CHRISTIAN IHMSEN
vs.
D. T. DONOVAN.

This suit is for the recovery of a debt which is claimed of the defendant as having been contracted with the mercantile firm of

Owen & Ihmsen, of Pittsburg, for moneys received for their use while he acted as their agent for the sale of coal in the city of New Orleans. The plaintiff is a member of that firm, and alleges that the entire debt belongs to him by assignment. The evidence shows that, between the months of March, 1849, and May, 1852, the defendant received numerous consignments of coal from that firm, and was employed at a specified salary to sell it for their account, and that much discretion was conceded to him in making the proper arrangements for that purpose. In 1852 the connection between the parties was terminated, and a controversy arose in the settlement of their accounts. The defendant, Donovan, commenced a suit against his principals by attachment in the 4th district court of the State, and the firm appeared and defended it. While it was pending there, an agreement to submit the whole controversy to arbitration was concluded between the parties. This agreement is contained in certain writings, which are set out in the petition. The award returned by the arbitrators was rejected by the district court, and the judgment of that court on it was affirmed, upon an appeal, by the Supreme Court.

The account attached to the petition is the one made up by the arbitrators on that submission, and the balance they declared is the debt claimed of the defendant.

We attach no consequence whatever to the conclusions of the arbitrators under the submission, and do not, in this judgment, place any reliance upon the award as the evidence of the debt. The plaintiff introduced in evidence here the statements of account made out, either by the defendant or under his authority, and adapted by him, his account-books of various kinds, and his admissions, for which we are satisfied that the defendant was indebted to the firm in the sum specified in the award, to wit, twenty thousand one hundred and forty-eight $\frac{50}{100}$ dollars, $20,148 50. The next inquiry is, whether the plaintiff has established a title to the debt. His evidence consists of the articles of agreement between the partners, Owen & Ihmsen, which are on file. In these the parties agree: "That said Ihmsen shall receive all moneys, merchandise, notes, &c., &c., &c., arising from sales of coal, &c., &c., &c.;" and further, "that the said C. Ihmsen shall have the closing and settling up of said business, and that all the effects of the said business, such as books, accounts, notes of hand, stock at New Orleans, notes at New Orleans, and cash on hand, either here or elsewhere, and stocks at the works, to be placed in the hands of the said C. Ihmsen for that purpose." In addition to this evidence, the plaintiff produces an assignment of the debt by Owen & Ihmsen to one Frederick Lorenz, of Pittsburg, and a re-assignment by the administrators of the estate of Lorenz to himself before the institution of this suit. We think that this evidence furnishes satisfactory proof of the plaintiff's title, and that he is authorized, according to the course of

practice in this State, to maintain an action in his own name. Hughes vs. Howison, 2d Louisa., 92.

The objection to the competency of the evidence, as not supporting the allegations of the petition, cannot be maintained. Courts in Louisiana are indulgent to pleaders, and do not exact the same fulness or accuracy of description in their petitions that distinguishes the declaration in courts of common law. They allow a plaintiff suing as an administrator to recover the sum claimed, if the evidence shows it to be due either in a representative or an individual capacity. Childress vs. Davis, 15 Louisiana R. 492. And where it appears that the parties were sufficiently notified of all the matter in controversy, and that the plea of res judicata can be supported by the judgment rendered on the evidence and petition, it will be sufficient, although the cause of action is not described with entire accuracy. Ovy vs. Winter, 4 N. S. 282; Boatner vs. Walker, 4 La. 313; 7 Louisiana, 95.

After the evidence was closed, the defendant filed the plea of prescription contained in the record.

Without considering the questions whether the account in this case is an open account, within the meaning of the statute of Louisiana, or whether the statute operates upon demands that were subsisting at its date, our conclusion is, that the proceedings in the 4th district court, relative to the award, were an interruption of that prescription. There was a suit pending between the parties, the present defendant being the plaintiff, which embraced a portion of the matter of this controversy. It was competent to the defendants, by instituting a demand in reconvention, to bring up the whole of the controversy for a settlement in that suit; and if that had been done, a legal interruption would have resulted within the 3484th, 3485th sections of the civil code. Dreggs vs. Morgan, 10 Rob., 120. This was not formally done on the record, but the parties did, by consent, that which we are bound to consider as having an equivalent value.

They came to an agreement that arbitrators selected by them should have the power to decide who was the creditor of the contesting parties, to settle finally ("without appeal") the amount due on either part, and that the attorney of either party might move for judgment on this award. It is clear, that had the arbitrators proceeded regularly, and a judgment been rendered upon it, that no exception could have been taken to the condition of the pleadings in the pending suit, or that there had not been a demand in reconvention. The consent in the submission agreement implied a waiver of all pleadings of that nature, and was a release of all errors in the preliminary stages of the suit.

Donovan appeared in the district court, and successfully resisted a motion for judgment upon the award rendered. But the code

does not require that a suit should be successfully prosecuted to operate as an interruption of prescription. Trop. de Pres. § 561; Dunn vs. Kinney, 11th Rob. 247; Baden vs. Baden, 4 Ann. 468.

Judgment is given for the plaintiff for the amount of the balance claimed, with interest, from judicial demand in this court.

(Signed) J. A. CAMPBELL,
Associate Justice S. C. U. S.

Judgment.

Circuit Court of the United States, fifth circuit and eastern district of Louisiana—November term, 1856.

New Orleans, Monday, 17th Nov'r, 1856. Court met pursuant to adjournment: Present Hon. Theo. H. McCaleb, district judge. The following judgment received from Hon. J. A. Campbell, presiding judge, was ordered to be filed and recorded.

CHRISTIAN IHMSEN
vs.
DENNIS T. DONOVAN. } 2,519.

This cause came on to be heard at the last term, and was argued by counsel: on consideration whereof, and by reason of the law and the evidence, it is now ordered and adjudged and decreed, that the plaintiff, Christian Ihmsen, do have and recover judgment against the defendant, Dennis T. Donovan, for the sum of twenty thousand one hundred and forty-eight $\frac{50}{100}$ dollars (20,148 $\frac{50}{100}$), with interest thereon at the rate of five per cent. per annum from the 23d of October, 1855, until paid, and costs of suit.

Judgment entered 17th November, 1856.

Minutes November term, 1856.

New Orleans, Thursday, 20th Nov'r, 1856. Court met pursuant to adjournment: Present Hon. Theo. H. McCaleb, dis't judge; absent Hon. J. A. Campbell, pesiding judge.

CHRISTIAN IHMSEN
vs.
DENNIS T. DONOVAN. }

Thomas J. Durant, esq., of counsel for defendant, this day presented to the court three several bills of exceptions on points stated to have been reserved on the trial of the cause, and moved that the plaintiff's counsel have until to-morrow within which time to inspect them, and that they then be signed and sealed by the court nunc pro tunc as of the day of trial.

Prayer for Statement of Facts, filed 20th Nov'r, 1856.

Circuit Court of the United States for the eastern district of Louisiana.

IHMSEN
vs.
DONOVAN.

And now on this twentieth day of November, 1856, into this honorable court by his counsel comes the defendant, D. T. Donovan, and gives the court here to understand, that he desires to appeal from the judgment entered herein on Monday, the 17th November, 1856, and to lodge a writ of error to operate as a supersedeas, that the case was not tried by a jury, but that the facts were found by the court. He therefore prays that the court will furnish a statement of facts whereon the judgment was based.

(Signed) DURANT & HORNOR,
Atty's of Def't.

Order.—Let a statement of facts be prepared by the counsel; and in case of disagreement, let reference be made to the court.

(Signed) THEO. H. McCALEB,
U. S. Judge.

Minutes November term, A. D. 1856.

New Orleans, Wednesday, 26th November, 1856. Court met pursuant to adjournment: Present Hon. Theo. H. McCaleb, district judge; absent Hon. J. A. Campbell, presiding judge.

CHRISTIAN IHMSEN
vs. 2,519.
DENNIS T. DONOVAN.

The court having examined the three several bills of exceptions numbered 1, 2, 3, presented by defendant's counsel, this day sealed and signed the same, and ordered that they be filed nunc pro tunc, as of the 7th day of June, 1856.

Defdt's Bill of Exceptions No. 1—Filed, by order of court, this 26th Nov'r, 1856, as of 7th June, 1856, nunc pro tunc.

In the Circuit Court of the United States for the eastern district of Louisiana.

C. IHMSEN
vs.
D. T. DONOVAN.

Be it remembered, that on the trial of this cause before the court alone, the trial by jury asked for having been waived by consent of

parties, the counsel of plaintiff having placed upon the witness-stand a certain W. T. Richards, proceeded to propound to him certain interrogatories, to the end of proving a connection between certain loose accounts produced by the plaintiffs, and alleged by them to have been furnished by defendant to them, and the account annexed to their petition, and on which they had declared.

To which interrogatories and proof the counsel of defendant objected, on the ground that this was no more than proving the account annexed to the petition; and that the said account was nothing more than a copy of the report of arbitrators who had been appointed in a certain suit heretofore pending in the fourth district court of New Orleans, in which D. T. Donovan was plaintiff, and Owen & Ihmsen defendant; that the said report had been rejected as illegal in the said fourth district court of New Orleans, and therefore could not now be given in evidence in this indirect manner, the parties to this suit being the same as the plaintiff claims here as transferee of Owen & Ihmsen, who were plaintiffs there; all of which facts, on which the objections of defendant's counsel were based, were admitted to be true; but the court having overruled the objections, and allowed the questions to be put and answered, and the proof objected to to be made, the counsel of defendant thereupon objected, and tendered this as a bill of exceptions, praying the same might be signed and made part of the record.

(Signed) THEO. H. McCALEB,
U. S. Judge.

Defdt's Bill of Exceptions No. 2.—*Filed* 26*th November*, 1856, *by order of court, nunc pro tunc, as of* 7*th June*, 1856.

In the Circuit Court of the United States for the eastern district of Louisiana.

C. IHMSEN
vs.
D. T. DONOVAN.

Be it remembered, that on the trial of this cause before the court alone, the trial by jury asked for having been waived by consent of parties, the counsel for plaintiff, in order to show the title of the plaintiff to debt, offered to read in evidence a written instrument purporting to have been made at Pittsburg, in the State of Pennsylvania, by which the administrators of F. Lorenz conveyed to plaintiff the claim now sued on, which instrument of conveyance is hereunto annexed, in order to form a part of this bill of exceptions.

To the introduction of which instrument of transfer the counsel of defendant objected, on the ground that no such transfer was alleged in the petition of pl'ff, and that it did not appear that by the laws of Pennsylvania, where the transfer purported to have been made,

that administrators of the estate of a deceased person had any legal authority to make such a transfer.

But the court overruled these objections and allowed the instrument to be given in evidence; whereupon the counsel of defd't excepted, and tenders this as his bill of exceptions, praying the same may be signed and made part of the record.

(Signed) THEO. H. McCALEB,
U. S. Judge.

Transfer of Claim by Administrators of F. Lorenz's Estate to C. Ihmsen, annexed to foregoing bill of exceptions.

Fourth District Court at New Orleans, La.

D. T. Donovan
vs.
Owen & Ihmsen.

For value received, we, the undersigned, administrators of the estate of Frederic Lorenz, late of the city of Pittsburg, in the State of Pennsylvania, deceased, do hereby assign, transfer, and set over unto Christian Ihmsen, (one of the above named defendants,) all the rights, title, interest, claim, and demand of him, the said Frederic Lorenz, dec'd, and of his estate, of, in, to, or out of the claim, demand, account, award, and judgment in the above cause, hereby giving and transferring unto the said Christian Ihmsen, lately of the firm of the said Owen & Ihmsen, all the entire claim of the said estate of Frederic Lorenz, deceased, which he had, in his lifetime, by transfer or assignment, of, in, to, or out of the claim and demand of the said Owen & Ihmsen, against the said D. T. Donovan.

Witness our hands and seals, this eleventh day of October, A. D. 1855.

(Signed) CATHARINE LORENZ, [SEAL.]
FREDERICK R. LORENZ, [SEAL.]
JAS. J. GRAY. [SEAL.]

Attest:
Thos. Steel,
F. McGowin,
Nelson Herch,
Jas. Eichbaum.

State of Pennsylvania,
County of Alleghany, and city of Pittsburg.

Before me, Thos. Steel, esquire, an alderman in and for the city of Pittsburg, and ex officio one of the justices of the peace in and for Alleghany county aforesaid, duly commissioned and qualified, personally came and appeared, witnesses Catharine Lorenz, widow

of the late Frederick Lorenz, deceased, of the said city, and Frederick R. Lorenz and James J. Gray, all of the said city, who are the administrators of the estate of the said Frederick Lorenz, deceased, who severally declared that the above and foregoing transfer and assignment made by them to Christian Ihmsen, of the said city, is just and true, and severally and jointly their act and deed, and desiring that the same may be recorded as such.

Thus done and passed at the said city and county, in the presence of Thos. Steel, Franklin McGowin, Nelson Hersh, and Joseph Eichbaum, competent witnesses, who hereunto sign their names, together with the said parties and me, the said alderman and justice of the peace, on this eleventh day of October, A. D. eighteen hundred and fifty-five.

(Signed) THOS. STEEL, [SEAL.]
Al'n and J. P.
CATHARINE LORENZ,
FREDERICK R. LORENZ,
JAS. J. GRAY,
F. McGOWIN,
NELSON HERCH,
JOS. EICHBAUM.

COMMONWEALTH OF PENNSYLVANIA,
Alleghany County, ss.

[SEAL.]

I, J. H. Robb, register for the probate of wills, granting letters of administrators, &c., in and for the county aforesaid, do hereby certify, that on the twenty-first day of September, A. D. 1854, letters of administration on the estate of Frederick Lorenz, deceased, late of Pittsburg, county aforesaid, were duly granted unto Catharine Lorenz, Fr. Lorenz, and Jas. J. Gray, who were duly qualified well and truly to administer the goods and chattels, rights and credits which were of said decedent; therefore all faith and credit are of right due, and ought to be paid to all their lawful acts, as such, throughout the United States and elsewhere.

Given under my hand and seal of office at Pittsburg, this twenty-first day of September, A. D. 1855.

(Signed) J. H. ROBB, *Register.*

CITY OF PITTSBURG,
County of Alleghany, State of Pennsylvania, ss.

I, Ch. McClure Hays, a commissioner of the State of Louisiana, duly authorized and commissioned by the governor thereof, for the State of Pennsylvania, and authorized to take acknowledgment of deeds and other writings to be used or recorded in said State of Louisiana, do certify that J. H. Robb, whose name is affixed to

the above certificate, to which is affixed the seal of office of the register for the probate of wills, granting letters of administration, &c., *in*, and was at the time of giving said certificate, register, &c., to all whose acts as such full faith and credit are of right due, and ought to be paid, throughout the United States and elsewhere; further, the said J. H. Robb acknowledged in my presence that he did sign and affix the seal of his office to the above certificate.

In witness whereof, I have hereunto set my hand and affixed my official seal this sixth day of December, A. D. 1855.

(Signed) CHS. McCLURE HAYS, [SEAL.]
Commissioner for Louisiana, in Pennsylvania.

ALLEGHANY COUNTY,
State of Pennsylvania, ss.

[SEAL.]

I, Edw. Campbell, jr., prothonotary of the court of common pleas in and for the county of Alleghany, in the Commonwealth of Pennsylvania, the same being a court of law and record, do by these presents certify, that Thomas Steele, esquire, before whom the foregoing acknowledgment was taken, and who has thereunto, in his own proper handwriting, subscribed his name, was at that time, and now is, an alderman of Second ward city of Pittsburg, and an acting justice of the peace in and for the said county, duly commissioned and sworn, and authorized by law to take acknowledgments, administer oaths, &c., to all whose acts as such due faith and credit are and of right ought to be given, throughout the United States and elsewhere, and said acknowledgment is taken, certified *certified*, according to the laws of Pennsylvania.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Pittsburg, in the said county, this 12th day of October, in the year of our Lord one thousand eight hundred and fifty-five, and of the sovereignty and independence of the United States of America the eightieth.

(Signed) E. CAMPBELL, JR.,
Prothonotary.

[SEAL.]

ALLEGHANY COUNTY,
City of Pittsburg, State of Pennsylvania, ss.

I, Ch. McClure Hays, a commissioner, resident in the State aforesaid, appointed by the governor of the State of Louisiana, to take the acknowledgments of all writings to be used or recorded in said Louisiana, which said writings may have been executed in the State of Pennsylvania, certify that E. Campbell, whose name is appended to the foregoing certificate, was at the date thereof prothonotary of the court of common plea, in and for the county of Alleghany, in the Commonwealth of Pennsylvania, (the same be-

ing a court of law and record, having a seal,) to all whose acts as such due faith and credit are and of right ought to be given, throughout the United States and elsewhere.

In testimony whereof, I have hereunto set my hand and affixed my official seal this second day of November, A. D. 1855.

(Signed) CHS. McCLURE HAYS, [SEAL.]
Commissioner for Louisiana, in Pennsylvania.

Defdt's Bill of Exceptions No. 3—*Filed by order of court this* 26*th Nov'r,* 1856, *nunc pro tunc, as of* 7*th June,* 1856.

Circuit Court of the United States for the eastern district of Louisiana.

C. IHMSEN
vs.
D. T. DONOVAN.

Be it remembered that on the trial of this cause before the court alone, the trial by jury asked for having been waived by consent of parties, the counsel of defendant offered, in order to prove plaintiff's title to the debt sued on, a written instrument from the fourth district court of New Orleans, and which had been filed there, purporting to be a transfer of all the claim and judgment in the suit of Donovan vs. Owen & Ihmsen, from the said Owen and Ihmsen to F. Lorenz, and which instrument is hereunto annexed as a part of this bill of exceptions, to the introduction of which instrument, for the purpose aforesaid, the counsel of def't objected, on the ground that the said instrument was not signed by F. Lorenz; nor was there any proof that he had accepted, or ratified, the same in his lifetime, he being now dead; and that the instrument was, therefore, no evidence of a contract.

But the court overruled these objections, and allowed the instrument to go in evidence; whereupon the counsel of defendant excepted, and tenders this as his bill of exceptions, praying the same may be signed and made part of the record.

(Signed) THEO. H. McCALEB,
U. S. Judge.

Transfer by Owen & Ihmsen to F. Lorenz, offered in evidence by pl'ff, C. Ihmsen, and received subject to exceptions, 7*th June,* 1856.

This copy admitted as an original by deft's counsel.

Attest: J. W. GURLEY, *C'lk.*

Transfer by Owen & Ihmsen to F. Lorenz, &c., annexed to bill No. 3.

Fourth District Court of New Orleans.

D. T. DONOVAN
vs.
OWEN & IHMSEN.
Filed Feb'y 8th, 1853.

For valuable consideration we have granted, bargained, sold, assigned, transferred, and set over, unto Frederick Lorenz, of Pitts-

burg, Pennsylvania, his executors, administrators, and assigns, the judgment recovered, had and obtained, by us in the above entitled case in said court, against the said D. T. Donovan, in the sum of twenty thousand one hundred and forty-eight $\frac{50}{100}$ dollars, and do transfer unto the said Frederick Lorenz all our right, title, and interest, in said judgment, and in our claims against the said D. T. Donovan, and all the benefit and advantage, sum and sums of money, that may be had, obtained or gotten, by reason or means of the said judgment and claims, or any proceedings to be had thereupon, and we do authorize said Frederick Lorenz to demand, sue for, and recover, receive and enjoy, the moneys due, and to be due, as aforesaid.

(Signed) OWEN & IHMSEN.
(Signed) Per C. IHMSEN.

Witness:
(Signed) K. LOEW, *D'y Clerk.*

A true copy of the original on file in the clerk's office of the fourth district court of New Orleans. May 14th, 1856.

JAS. B. MURTAGH, [SEAL.]
Dep. Cl'k.

Deft's Bill of Exceptions No. 4, *filed* 26*th Nov'r,* 1856.

Circuit Court U. S. for the eastern district of Louisiana.

IHMSEN
vs.
DONOVAN.

In this case the court ordered the following entry to be made this day, 26th November, 1856:

On Saturday, 22 inst., November, 1856, the counsel of defendant called on the counsel of pl'ff in open court to co-operate with him in making a statement of facts in this case, in order to enable the defendant to take the case upon writ of error to the Supreme Court of the U'ted States; and at the same time the counsel of defendant presented a statement of facts prepared by himself, and called upon the counsel of plaintiff to examine the same, and say whether he concurred therein or not; whereupon E. A. Bradford, esq., acting for M. M. Cohan, esq., on behalf of plaintiff, refused to examine said statement of facts, and refused to co-operate with the counsel of plaintiff in making any statement of facts whatever. And thereupon the counsel of plaintiff moved the court to prepare a statement of facts, as no agreement of counsel could be arrived at; and the court having considered said motion, his honor Judge McCaleb, sitting alone in the absence of Judge Campbell, now refuses to make the statement of facts applied for by the defendant's counsel, on the ground that the papers in the case were taken by

Judge Campbell to Washington, and the judgment prepared by him alone and sent here to New Orleans to be entered on the record, and that the statement of facts can only be made out by Judge Campbell.

To which refusal of the court by Hon. Judge McCaleb the counsel of defendant excepted, and tenders this as his bill of exceptions, praying the same may be signed and made part of the record.

(Signed) THEO. H. McCALEB,
U. S. Judge.

Petition for Writ of Error, filed 2d Dec'r, 1856.

Circuit of the United States for the eastern district of Louisiana.

C. IHMSEN
vs. } 2,519.
DENNIS T. DONOVAN.

And now into this honorable court comes Dennis T. Donovan, the above named defendant, and says he is advised there is error to his prejudice in the judgment recently rendered against him in the above named cause, and he desires to remove the said cause by writ of error, returnable to the next term of the Supreme Court of the United States, and to give bond in such sum as the court shall direct, with good and solvent security to operate as a supersedeas.

Wherefore he prays a writ of error may now be granted him to remove said suit and the proceedings therein to the next term of the Supreme Court of the United States, and that all the necessary process and papers may be issued by the court to effect that end.

(Signed) DURANT & HORNOR.

Order allowing Writ, &c.—Minutes 2d Dec'r, 1856.

New Orleans, Tuesday, 2d December, 1856. Court met pursuant to adjournment: Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

CHRISTIAN IHMSEN
vs. } 2,519.
DENNIS T. DONOVAN.

On motion of Thomas J. Durant, esq., of counsel for defendant, Dennis T. Donovan, and on presenting and filing the petition of the said defendant, representing that he is aggrieved by the judgment herein rendered against him, and praying for a writ of error therefrom to operate as a supersedeas, and returnable to the next term of the Supreme Court of the United States, it is ordered that the writ be allowed as prayed for upon the said defendant, giving bond with good and solvent security thereon, and conditioned according to law, in the penal sum of thirty thousand dollars.

1263

Bond for Writ of Error, filed 2d Dec'r, 1856.

Know all men by these presents, that we, Denis T. Donovan, as principal, and Charles Diamond and Bernard Wheelehan as sureties, are held and firmly bound unto Christian Ihmsen in the full and just sum of thirty thousand dollars, to be paid to the said Christian Ihmsen, his certain attorney, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this first day of December, in the year of our Lord one thousand eight hundred and fifty-six.

Whereas, lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein Christian Ihmsen was plaintiff, and Denis T. Donovan was defendant, judgment was rendered against the said Denis T. Donovan, and the said Denis T. Donovan having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Christian Ihmsen, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Denis T. Donovan shall prosecute this writ to effect, and answer all damages and costs if he fail to make his plea good, and pay such judgment as may be finally rendered against him, then the above obligation to be void, else to remain in full force and virtue.

(Signed)	D. T. DONOVAN,	[SEAL.]
"	BERNARD WHEELEHAN,	[SEAL.]
"	CH'S DIAMOND,	[SEAL.]
"	FRANCIS MARTIN.	[SEAL.]

Sealed and delivered in the presence of—
W. LAVISSON.

(*Endorsed.*)

Charles Diamond, surety on within bond, being sworn, says he is worth the sum of thirty thousand dollars, over and above his debts and liabilities.

(Signed) CH'S DIAMOND.

Sworn to and subscribed before me, this 1st December, 1856.

(Signed) J. W. GURLEY, *Cl'k.*

Approved.

(Signed) THEO. H. McCALEB,
U. S. Judge.

UNITED STATES OF AMERICA.

Circuit Court of the United States, fifth circuit and eastern district of Louisiana.

CLERK'S OFFICE.

I, John W. Gurley, clerk of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, do hereby certify, that the foregoing 47 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had in the case of Christian Ihmsen vs. Dennis T. Donovan, No. 2,519 of the docket, so far as the same now remain of record or on file in said court.

[L. S.] Witness my hand and the seal of said court, at the city of New Orleans, this 19th day of March, A. D. 1857.

J. W. GURLEY, *Clerk.*

Writ of Error.

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the Judges of the Circuit Court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or one of you, between Christian Ihmsen and Dennis T. Donovan, a manifest error hath happened, to the great damage of the said Dennis T. Donovan, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this second of December, in the year of our Lord one thousand eight hundred and fifty-six.

J. W. GURLEY,
Clerk of the United States Circuit Court for eastern district of Louisiana.

Filed 2d December, 1856.

J. W. GURLEY, *Cl'k.*

Citation in Error.

THE UNITED STATES OF AMERICA.

The President of the United States to Christian Ihmsen, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein Dennis T. Donovan is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this second day of December, in the year of our Lord one thousand eight hundred and fifty-six.

THEO. H. McCALEB,
U. S. Judge.

Marshal's Return.

Received December 2d, '56, and on the 3d day of December, 1856, served copy of the within citation in error on Mr. Christian Ihmson, by handing the same to Mr. M. M. Cohen, att'y of said Christian Ihmson, being absent at the time. M. M. Cohen accepted service in person, in the city of New Orleans, and returned December 3d, 1856.

WILLIAM BULLETT,
U. S. D. Marshal.

Filed 28th Oct., 1857.